

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



76-2095

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

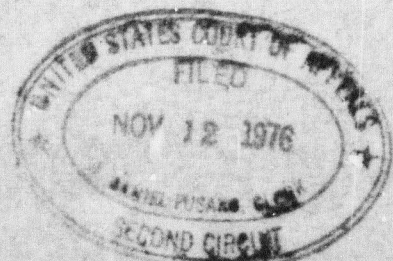
-----X  
TIVIS TROIT HAWKINS II, :  
Plaintiff-Appellant, :  
-against- :  
HON. J. E. LaVALLES, Superintendent, :  
Clinton Correctional Facility, :  
T. J. O'CONNOR, Secretary, :  
Institutional Media Review Committee, :  
COMMISSIONER OF CORRECTIONAL SERVICES, :  
RONALD HADDAD, Administrative :  
Assistant, Program Services, :  
Department of Correctional Services, :  
Defendants-Appellees. :  
-----X

BRIEF FOR DEFENDANTS-APPELLEES

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of Counsel





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BRIEF FOR DEFENDANTS-APPELLEES

Plaintiff-appellant appeal from a decision of the  
United States District Court for the Northern District of  
New York (Port, J.) dated January 28, 1976, dismissing sua sponte  
plaintiff's civil rights complaint.



### Question Presented

1. Whether the Court lacks personal jurisdiction over the defendants-appellees in this suit for damages, where they have not been served nor have they appeared in this action?

### Preliminary Statement

Appellant, who is presently an inmate at Clinton Correctional Facility, instituted an action in the United States District Court for the Northern District of New York pursuant to Title 42 U.S.C. § 1983 alleging a deprivation of his civil rights. The defendants were never served with a summons or a complaint and therefore did not submit a response. In his complaint, plaintiff-appellant alleges that the mail censorship guidelines have been applied in derogation of his substantive First Amendment rights and that the administrative actions in question are defective for failure to provide due process.

While granting Hawkins leave to proceed in forma pauperis, the lower court "denied and dismissed" the complaint, holding that the materials received by Hawkins in the past, allegedly of the exact nature as the materials withheld, were "hard-core" pornography not within the protection of the



First Amendment. The lower court found that the materials were rejected on the ground that they were entirely without redeeming social value, sufficient reason for their rejection. The lower court stated that whether the Guideline prohibited material appealing to prurient interest was not a critical factor. The District Court (Port, J.), without directing that the defendants be served or submit a response, dismissed the complaint.

#### ARGUMENT

THE COURT LACKS PERSONAL JURIS-  
DICTION OVER THE DEFENDANTS-  
APPELLEES IN THAT THEY HAVE NOT  
BEEN SERVED NOR HAVE THEY  
APPEARED IN THIS ACTION.

The record indicates that no summonses were issued or served on any of the defendants. No motion or answer was requested, or submitted by any of the defendants. The District Court dismissed the case sua sponte after granting plaintiff leave to proceed in forma pauperis. Thus it is clear, pursuant



to Rule 4 of the Federal Rules of Civil Procedure -- which requires service of process upon each defendant -- that the Court lacks personal jurisdiction. It is well settled that a dispute is not within the jurisdiction of the Court unless the defendant is before such Court by reason of a general appearance or a valid service of process. As the Supreme Court stated in Employers Corp. v. Bryant, 299 U.S. 374, 380 (1937):

"By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam ... is an essential element of the jurisdiction of a district ... court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication." (footnote omitted).

In the case at bar none of the defendants have been served nor have they appeared in this action. The Court has not acquired jurisdiction and accordingly the appeal should be dismissed. Lewis v. Ward, No. 76-2061 (2nd Cir. Oct. 27, 1976).



CONCLUSION

THE APPEAL SHOULD BE DISMISSED  
AND THE CASE REMANDED TO THE  
DISTRICT COURT WITH AN ORDER  
TO VACATE THE DECISION FOR LACK  
OF JURISDICTION.

Dated: New York, New York  
November 12, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants-  
Appellees

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

GERALD J. RYAN  
Assistant Attorney General  
of Counsel



STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

Rosalba Federici , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 12th day of NOVEMBER , 1976 , s he served the annexed upon the following named person :

PAULA A. SWEENEY  
Attorney for Plaintiff-Appellant  
23rd Floor  
30 Rockefeller Plaza  
New York, New York 10020

Attorney in the within entitled Appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Rosalba Federici

Sworn to before me this  
12th day of NOVEMBER , 1976

Assistant Attorney General  
of the State of New York